
(by Claudia Geiringer, Polly Higbee and Elizabeth McLeay, Victoria University Press, 2011, 177 pp)

What’s The Hurry? is an outstanding publication. The book offers a clearly articulated account of how motions of urgency operate under the Standing Orders, a thorough analysis of how urgency motions have been used over an important 24-year legislative period, and retrieves insightful accounts of the process through a number of interviews of key participants in the legislative process. This all provides for a discussion of a controversial aspect of New Zealand parliamentary procedure that is unparalleled in the existing literature. Although I benefited greatly from the explanations and insights and found myself agreeing with the authors’ recommendations as to how the Standing Orders could be improved, I put the book down with sense of agnosticism as to whether the use of urgency motions prior to 2011 was a legitimate or illegitimate tool exercised by governments to advance their legislative programmes. In this review I will: (A) provide an overview of the excellent analysis contained in the book and then (B) explain my reservations as to the authors’ application of the principles of democratic legitimacy.

A Overview

Allow me to start at Chapter Two, which provides a detailed account of the effect of an urgency motion on the legislative process. This provides the focal point of the analysis in the book. As the authors explain, urgency overrides the House’s standard legislative procedures by extending the normal sitting hours and by prioritising the matters that have been accorded urgency over the other business of the House. An urgency motion may also remove the stand-down periods between the stages of the passage of a bill and may bypass the select committee process. Chapter Two then locates disagreement as to the use of urgency amongst a “series of underlying tensions”, such as the use, or over-use, of legislation to address social problems, the tension between the legislative agenda of the governments, and the competing agenda of opposition parties and the tension as to how the House proportions its time between its legislative function and its other important constitutional roles.

Chapter Three draws upon the series of interviews conducted with a number of key participants in the political system to identify the reasons why governments use urgency. The picture that emerged from the interviews is that urgency is viewed by politicians as a “legitimate and time-honored mechanism to supplement the House’s regular sitting hours from time to time in order to ensure that governments achieve more during their time in office than they might otherwise be able to”. Beyond identifying this general attitude, the authors were also able to identify some of the specific reasons why urgency was invoked to
hasten the passage of legislation. These included “pre-emptive” actions to minimise speculative market behaviour, responding to an unexpected event, or legislation aimed at an external deadline. In addition, the authors also identified as an emerging theme from the interviews the “insufficient scheduled sitting hours to get through the government’s legislative agenda” as well as a series of examples of where urgency has been used for tactical reasons.

Chapter Four is an invaluable contribution to our understanding of urgency. The authors’ study of urgency motions over 24 years (1987–2010) is meticulously broken-down into a series of tables and figures that clearly map-out the various uses of urgency over the 24-year period. Since an urgency motion can take various forms that have varying effects on the legislative process, the authors are very careful in their “unpicking” of the “stages for which urgency was taken”. Their data forms the basis of two main observations. The first is that urgency was used more by pre-MMP single-party majority governments than governments under MMP (although two MMP parliaments (1996–1999 and 2009–2011) “stand out for the comparative high use of urgency motions”). The second observation concerns the use of urgency for “all stages of the a bill’s passage” or for the elimination of the select committee process. The use of this extensive form of urgency was comparatively frequent in the two above-mentioned parliaments under the MMP (1996–1999 and 2009–2011).

Chapter Five then attempts to identify the constraints on the use of urgency. Apart from the very rare employment of extraordinary urgency motions, the authors explain that “the only explicit constraint” on the use of urgency motions “is the need to get the support of the House”. This gives rise to both internal and external constraints. The discussion offers insightful examples of how the role of the opposition in employing “delay tactics” to “punish” the abuse of urgency as well as the effect of the use of urgency on the government’s own MPs and parliamentary business provide internal constraints on the use of urgency. In terms of external constraints, the authors describe the media coverage of the use of urgency as “somewhat irregular and unpredictable”. As a result, the public have a limited interest in, and understanding of, parliamentary procedure. The authors then make an important point: since urgency (prior to 2011) was a hybrid of a fast-tracking legislation and extending sitting hours, the terminology of “urgency” may have generated “confusion as to the constitutional ramifications of what is occurring”.

The authors are also interested in the impact of MMP on the use of urgency. The authors, with good use of both sets of data from the previous chapter, provide explanations for why urgency was ultimately used less often in MMP Parliaments as well as the variation in the use of urgency between MMP Parliaments. This was explained with reference to “a complex list of factors ... including the particular make up of the governing majority, the ideological perspectives of support parties and the people who comprise them, and the overarching support
arrangement that have been entered into”.

Chapter Seven then considers options for reform. In early 2011, the authors had made a submission to the Standing Order Committee. The Committee adopted, in general form, two of the authors’ recommendations: that the Standing Orders include an “extending sitting” power as separate from urgency and that the Standing Orders require in a motion for urgency “greater specificity in the reasons given in urgency motions”. The Committee did not adopt the authors’ recommendation that an urgency motion ought to be “limited to legislative business only in relation to one bill” nor did the Committee adopt the recommendation that the “use of urgency to eliminate the select committee stage” ought to obtain approval of the Speaker.

B Democratic Legitimacy

Allow me to return to Chapters One and Six. Chapter One sets out “Ten Principles of Good Law-Making”. The first four concern important procedural aspects of deliberative democracy: (1) elected representatives ought to provide reasons for their actions, (2) the House of Representatives ought to provide effective scrutiny of the government, (3) citizens ought to be able to participate in the legislative process and (4) the legislative processes ought to be open and accessible.

The fifth and sixth principles are curious. We are told that (5) the House should strive to produce “high quality legislation”, and that the “quality” of the legislation may be affected by inadequate scrutiny, inadequate deliberation by elected representatives and inadequate participation by the public. Our qualitative understanding of legislation therefore dissolves into the above procedural aspects of deliberative democracy. The sixth principle is that (6) “legislation should not jeopardise fundamental constitutional rights and principles”. The authors note that the characterisation of these “fundamental rights” may be “controversial”, so we are left with the “bare proposition” that “legislation should not trench on constitutional rights or principles without justification.” If this requirement is that elected representatives ought to provide justification for the limitation of “constitutional” rights, then I struggle to see how (6) can be differentiated from (1), the requirement that elected representatives provide reasons (or justifications) for their (legislative) actions.

The seventh principle is that (7) law-making should be “conducted to Parliament’s regular (not exceptional) procedural rules” in order to maintain a “stable policy-making environment”. Principle eight then provides a further reason for ultimately the same principle: (8) “due process and regular legislative stages” ought to be followed as such procedures “help maintain respect for parliaments ... and the bills that become law”.

These eight principles become the basis for criticising the use of urgency motions in Chapter Six. Yet, I have doubts as to whether these eight principles represent eight distinct principles. Rather, they appear to be unnecessarily fragmented. As a result, the transgressions of urgency
motions (outlined in Chapter Six) appear more numerous than if these principles were less fragmented.

Chapter One also briefly outlines two final principles, that: (9) “governments ultimately have the right to implement their policy programs through legislation” and (10) “parliament should be able to enact legislation quickly in (actual) emergency situations”.

In Chapter Six, the authors question whether urgency is “a valid procedural device for extending the House’s sitting hours and pushing forward with the government’s legislative programme.” The Chapter begins by questioning the perception that the sitting schedule restricts the ability of a government to advance its legislative agenda. The authors suggest that New Zealand would benefit from a wide-ranging review on the proportion of time Parliament allocates for its various functions and also offer some possible solutions to the (real or perceived) problem of insufficient time “to process the government’s legislative business”.

Chapter Six also concerns the democratic legitimacy of urgency motions. In four lines we are informed as to how “urgency advances principles 9 and 10.” The remaining discussion then outlines how urgency, to a greater or lesser extent (depending on the form of urgency), offends against the remaining eight principles. Urgency motions are treated as being constitutionally illegitimate, or at least constitutionally troublesome, because the scorecard for democratic legitimacy reads 2-for, and 8-against. Scepticism creeps in because of the extent to which principles (1) to (8) are fragmented in Chapter One and are then discussed at length in Chapter Six. In contrast, principles (9) and (10) are given cursory treatment.

I have no doubt that the authors are correct in their claim that urgency motions, and especially urgency motions that bypass the select committee process, offend against (1) reasons for legislative actions, (2) scrutiny by the House, (3) participation by citizens, (4) transparency and (7/8) procedural stability. However, if we are attempting to identify the best apportionment of parliamentary time as between the function of Parliament and the deliberative procedures of Parliament, the difficulty is in identifying the relative constitutional importance of the procedural principles as against the relative constitutional importance of the ability of governments to enact legislation (and to enact legislation quickly).

Chapter Six did little in the way of demonstrating why I should be more concerned about procedural principles of deliberative democracy than the function of a democratic government when forming an opinion as to the optimal apportionment of parliamentary time or forming an opinion as to the current apportionment of parliamentary time. Rather than trying to calibrate the relative constitutional importance of these competing values, the authors evade the issue by fragmenting procedural principles and then allocate a disproportionate amount of their own time to the discussion of how urgency offends against these “eight” principles.

In all other regards the book is to be commended. The authors took great care explaining how urgency takes on various forms and consequently
has differing constitutional effects. Moreover, their recommendations (in Chapter Seven) are sensible and are grounded in thorough research and reasoned criticism of the current Standing Orders (or the Standing Orders prior to November 2011).

Jesse Wall,

Junior Research Fellow,

Merton College,

University of Oxford.